



Office of the Commonwealth Ombudsman

OWN INITIATIVE INVESTIGATION

**AFP USE OF POWERS UNDER THE *INTOXICATED PERSONS
(CARE AND PROTECTION) ACT 1994 (ACT)***

CONTENTS

OVERVIEW	iii
PART 1: INTRODUCTION.....	1
BACKGROUND.....	1
SCOPE	2
METHODOLOGY	2
PART 2: OPERATION OF THE ACT.....	3
POLICE POWERS AND RESPONSIBILITIES UNDER LEGISLATION	3
<i>Protective Custody under the Act</i>	3
AFP GUIDELINES.....	4
POLICE PRACTICES.....	4
<i>AFP Officers' Views of the Act</i>	4
<i>Statistics</i>	6
PART 3: IMPLEMENTATION OF 1998 RECOMMENDATIONS.....	9
TRANSPORTATION OF DETAINEES	9
<i>New Issues Arising</i>	10
Sedans and Caged Vehicles	10
<i>Discussion</i>	10
<i>Opinion</i>	11
<i>Recommendations</i>	12

WATCH-HOUSE PRACTICES	12
<i>Use of Holding Cells</i>	12
<i>Early Release to Responsible Persons</i>	13
<i>Streamlined Watch-house Procedures</i>	15
<i>New Issues Arising</i>	16
Detention beyond Eight Hours.....	16
<i>Discussion</i>	17
<i>Opinion</i>	18
<i>Recommendations</i>	19
GUIDELINES AND TRAINING.....	20
<i>Discussion</i>	21
<i>Opinion</i>	23
<i>Recommendation</i>	23
LEGISLATION	24
Street Offences.....	25
Level of Intoxication.....	25
Review	26
<i>Opinion</i>	26
<i>Recommendations</i>	27
SOBERING-UP SHELTER	27
APPENDIX I. OTHER RELEVANT LEGISLATION.....	30
<i>Liquor Licensing Laws</i>	30
<i>Street Offences</i>	30
<i>Drink Driving Offences</i>	31
<i>Treatment of Inebriates</i>	31

OVERVIEW

1. In December 1998, the Ombudsman issued a report into the use of police powers under the *Intoxicated Persons (Care and Protection) Act 1994* (ACT). The focus of that report was the need for the police to adopt practices and procedures commensurate with the “care and protection” elements of the legislation. At the conclusion of the report, the Ombudsman indicated his intention to ‘review operation of the revised arrangements and procedures for the management of intoxicated persons’ after one year from reporting.

2. On 16 June 2000, the Ombudsman informed the Commissioner of the Australian Federal Police (AFP) that he had decided to undertake, on his own initiative and in accordance with section 21A(1)(a) of the *Complaints (Australian Federal Police) Act 1981*, an investigation of the current practices and procedures adopted by the police in exercising their powers under the *Intoxicated Persons Act*.

3. The aim of this latest investigation has been to determine to what extent the recommendations of the 1998 report have been implemented by the AFP, and how effective the new practices and procedures have been. In those instances where the 1998 recommendations have not been implemented, we have examined the reasons why, and assessed what impact, if any, this has had on the AFP’s management of intoxicated persons in the ACT.

4. In particular, we have revisited the issue of legislative reform and a Sobering-Up Shelter for the ACT and the effect the absence of both has had on police practices. We have also noted some new issues that have arisen during the course of this latest investigation, most notably the possible unlawful detention of people beyond the statutory eight-hour limit.

5. In relation to many of the recommendations of the 1998 report, we have been satisfied that the AFP have adopted practices and procedures which reflect the “care and protection” elements of the legislation. However, we believe there is still scope for further improvements and refinement of police guidelines and practices, particularly in relation to:

- (i) the continued use of caged vehicles despite AFP guidelines directing otherwise;
- (ii) the need for continued effort towards the early release of intoxicated persons from protective custody; and
- (iii) the continuing need for clarification and guidance on officers’ responsibilities in relation to street offences.

6. Accordingly, the Ombudsman has made a number of recommendations, mostly concerning revision of AFP Guidelines. The Chief Police Officer for the ACT has indicated his acceptance of these recommendations, and has proposed to establish a Team to review and implement them. This office will continue to take an interest in these issues and has agreed to play a role in the proposed ACT Policing review.

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OWN INITIATIVE INVESTIGATION

AFP USE OF POWERS UNDER THE *INTOXICATED PERSONS (CARE AND PROTECTION) ACT 1994* (ACT)

PART 1: INTRODUCTION

Background

1.01 The *Intoxicated Persons (Care and Protection) Act 1994* (ACT) (“the Act”) came into force on 15 December 1994. The purpose of the legislation was the decriminalisation of public drunkenness and the provision of an alternative mechanism for dealing with the problem of public drunkenness, namely a Sobering-Up Shelter that would receive and care for intoxicated persons until sober.

1.02 The aim of decriminalisation has been described as ‘redefin[ing] public drunkenness as a social and welfare problem, rather than as criminal behaviour. The corollary of this is that the response to public drunkenness is also redefined as care rather than punishment’.¹ Even so, it is widely accepted that police still have a crucial role in identifying and dealing with, at least in the first instance, intoxicated persons.

1.03 The protective custody provisions of the Act allow police to detain intoxicated persons for periods of up to eight hours. Police can use protective custody without reference to any external authority and the Act provides no mechanism for appeal. Since the Act’s introduction in 1994, police have taken over 6000 people into protective custody.

1.04 In December 1998, the Ombudsman issued a report into the use of police powers under the *Intoxicated Persons (Care and Protection) Act 1994* (ACT). The focus of the Ombudsman’s report was the need for the police to adopt practices and procedures commensurate with the “care and protection” elements of the legislation. At the conclusion of the report, the Ombudsman indicated his intention to ‘review operation of the revised arrangements and procedures for the management of intoxicated persons’ after one year from reporting.²

¹ R. Midford, *A Practical Guide to the Establishment and Community Management of Sobering Up Centres*, Statewide Purchasing Authority, WA, 1995, p. 8.

² Commonwealth Ombudsman, ‘Investigation into the Use of Police Powers under the *Intoxicated Persons (Care and Protection) Act 1994* (ACT)’, December 1998, p. 37. Herein referred to as “the 1998 report”.

1.05 On 16 June 2000, the Ombudsman informed the Commissioner of the Australian Federal Police (AFP) that he had decided to undertake, on his own initiative and in accordance with section 21A(1)(a) of the *Complaints (Australian Federal Police) Act 1981* (C'th), an investigation of the current practices and procedures adopted by the police in exercising their powers under the *Intoxicated Persons Act* (ACT).

Scope

1.06 The aim of this latest investigation has been to determine to what extent the recommendations of the 1998 report have been implemented by the AFP and how effective the new practices and procedures have been. In those instances where the 1998 recommendations have not been implemented, I have examined the reasons why, and assessed what impact, if any, this has had on the AFP's management of intoxicated persons in the ACT. In particular, I have revisited the issue of legislative reform and a Sobering-Up Shelter for the ACT and the effect the absence of both has had on police practices. I have also noted some new issues that have arisen during the course of my latest investigation.

1.07 In relation to case-evidence, I have limited the current investigation to the period from 1 July 1999 to 30 June 2000. This timeframe takes into account any necessary lead-time for the implementation of the recommendations of the 1998 report and is in keeping with the timeframe of the earlier investigation.

Methodology

1.08 My investigator has largely followed the methodology of the previous investigation. He has:

- reviewed the sixteen complaints relating to protective custody received by my office between 1 July 1999 and 30 June 2000, distilling from these a number of common issues and concerns;
- gathered and analysed the AFP's data on protective custody for the same period (including a sample of 198 cases), as well as examining the AFP's revised training manuals and guidelines;
- observed AFP officers of the City Beat on patrol in Civic and at the City Watch-House, as well as conducting a series of discussions and exchanges with police from the various ACT Regions;
- spoken with representatives of ACT Health and Community Care in relation to Sobering-Up facilities.

1.09 In addition, meetings have been held with senior AFP officers.

PART 2: OPERATION OF THE ACT

2.01 Much of the Act is concerned not with police interaction with intoxicated persons but rather with the powers and responsibilities of those operating, or working in, licensed Sobering-Up Shelters. However, the new legislation carried over the old police powers contained in section 351 of the *Crimes Act 1900* (ACT). Accordingly, I begin with an outline of how the Act prescribes police powers and responsibilities in relation to intoxicated persons and those people licensed to care for them.

2.02 The use of police powers under the Act also needs to be considered in the context of other relevant legislative provisions. Similarly, AFP Guidelines need to be considered, both as evidence of the AFP's comprehension of their powers and responsibilities under the Act as well as for their translation of the Act into practical guidance for AFP officers. Finally, police practice itself requires examination. I have done this by reference to statistics, observations and discussions with the officers themselves.

Police Powers and Responsibilities under Legislation

Protective Custody under the Act

2.03 Under section 4(1) of the Act, the police are empowered to detain persons whom they reasonably believe are intoxicated and who, as a result of that intoxication, are behaving in a disorderly manner, behaving in a manner likely to cause injury or damage to property, or are incapable of protecting themselves from physical harm. This power applies only to persons in a public place.

2.04 "Intoxicated" is defined as 'apparently under the influence of alcohol, another drug, or a combination of drugs' (section 3(1)). The belief that a person is intoxicated is not sufficient to warrant police action. The police must make some connection between intoxication and one of the three factors noted above before they can take a person into protective custody.

2.05 Once in protective custody, the police must release a person when he or she is no longer intoxicated or at the expiration of eight hours, whichever is earlier (section 4(2)). However, police can release a person from protective custody at any earlier time if they believe it reasonable to do so (section 4(4)). The Act deems early release of a person into the care of the manager of a licensed Sobering-Up Shelter to be always reasonable (section 4(5)). A person may choose to remain at a police station for up to twelve hours after they were first detained; however, police can compel a person to leave after the expiration of those twelve hours (section 4(3)). That is, after eight hours a person is free to leave police custody, but can remain by choice for a further four hours.

2.06 Police powers to search intoxicated persons are outlined in section 5 of the Act.

2.07 If police release a person into the care of the manager of a licensed Sobering-Up Shelter they must provide the manager with an admission statement containing:

- the name of the intoxicated person (if known)
- their date of birth (if known)
- the time and date when the person was detained
- an itemised list of articles taken from the person during a search
- and confirmation that any such items have been returned (section 6(1) and (2)).

The police may release any further information they reasonably believe will assist the manager in caring for the person (section 6(3)).

2.08 As was noted in the Ombudsman's 1998 report, other legislation relating to the broader issue of alcohol consumption, as well as other legislative sources of police power, need to be considered in any examination of the use of police powers in relation to intoxicated persons. As these were largely covered by the 1998 report, I have simply summarised these provisions at Appendix I.

AFP Guidelines

2.09 There are two principal sets of AFP Guidelines which concern the handling of intoxicated persons in the ACT: *Guidelines for Best Practice 4/96: Care of People in Police Custody* and *Guideline for Best Practice 30/97: Watch House*. Also of relevance is the *AFP National Guideline on Police Custodial Facilities and People in Custody*. There are no Guidelines dealing specifically with protective custody, although Guideline 4/96 has a special section on protective custody.

2.10 The Guidelines are discussed in greater detail in parts 3 and 4 below.

Police Practices

AFP Officers' Views of the Act

2.11 As for the 1998 report, to gain a practical appreciation of the application of the Act by police, my investigator has observed AFP officers of the City Beat on patrol in Civic and at the City Watch-House, as well as conducting a series of discussions and exchanges with police from a number of ACT Patrols.

2.12 The Ombudsman's 1998 report set out in some detail the views and practices of AFP officers in relation to the Act.³ In many ways, these views

³ The 1998 report, pp. 12–16.

remain the same. I set out below, in summary form, a selection of the most relevant of these.

- Patrol officers consider the Act to serve two functions: to protect intoxicated persons from themselves; and to protect the community from the disorderly behaviour of intoxicated persons.
- Officers consider protective custody as a last resort and repeatedly encourage intoxicated persons to return home before taking them into custody. Generally, intoxicated persons comply with police suggestions to return home. Most officers feel that the majority of people taken into protective custody are heavily intoxicated.
- Some officers are concerned that liquor-licensing regulations – particularly in relation to the continued serving of intoxicated persons – exacerbate the problem of intoxicated persons in public.
- Officers are sceptical of the value of a Sobering-Up Shelter, believing that in most cases the City Watch-house is the most suitable facility to accommodate intoxicated persons. Some officers believe that many intoxicated persons welcome protective custody, allowing them to “sleep off” the effects of their intoxication in a safe environment. Officers also expressed the view that police intervention could assist an intoxicated person to sober up.
- Watch-house staff are satisfied that “on-line charging” procedures (that is, the same procedure for dealing with offenders) are the most effective means of processing intoxicated persons.
- Watch-house staff reported that responsible persons were regularly contacted by Watch-house officers and, where the person was appropriate and willing and the detainee in a suitable condition (that is, not severely intoxicated, violent or suicidal), the intoxicated person was released into the care of the responsible person.
- Watch-house staff expressed some concern about the rights of an intoxicated person to call for medical attention and/or communication with a legal practitioner, relative or friend, believing that this was a right too easily abused.
- Watch-house staff considered charging intoxicated persons with substantive offences (where appropriate) as providing a more effective deterrent of irresponsible drinking than the use of protective custody. Intoxicated persons charged with an offence are detained and bailed

when sober. However, Watch-house staff also indicated that there were difficulties in referring street offence charges against intoxicated persons to the Director of Public Prosecutions, as Watch-house sergeants are required to indicate whether, in their opinion, the prosecution would be successful, and in most cases of street offences, they feel unable to do this.

- Officers from the Woden Patrol indicated concern at the loss of patrol time taken in conveying an intoxicated person to the City Watch-house and noted that intoxicated persons were sometimes taken home directly by police, if appropriate.

Statistics

2.13 Between 1 July 1999 and 30 June 2000, police took 1026 people into protective custody. This is a significant decrease on the figures recorded in the Ombudsman's 1998 report: down 23 per cent on the low of 1995/96 and down 48 per cent on the high of 1996/97.⁴ Protective custody for 1999/2000 amounted to approximately 30 per cent of the total custody figures (3395) for that period. This also represents a significant decrease on the figures noted in the 1998 report, which had protective custody running at between 40 and 45 per cent of total custodies.⁵

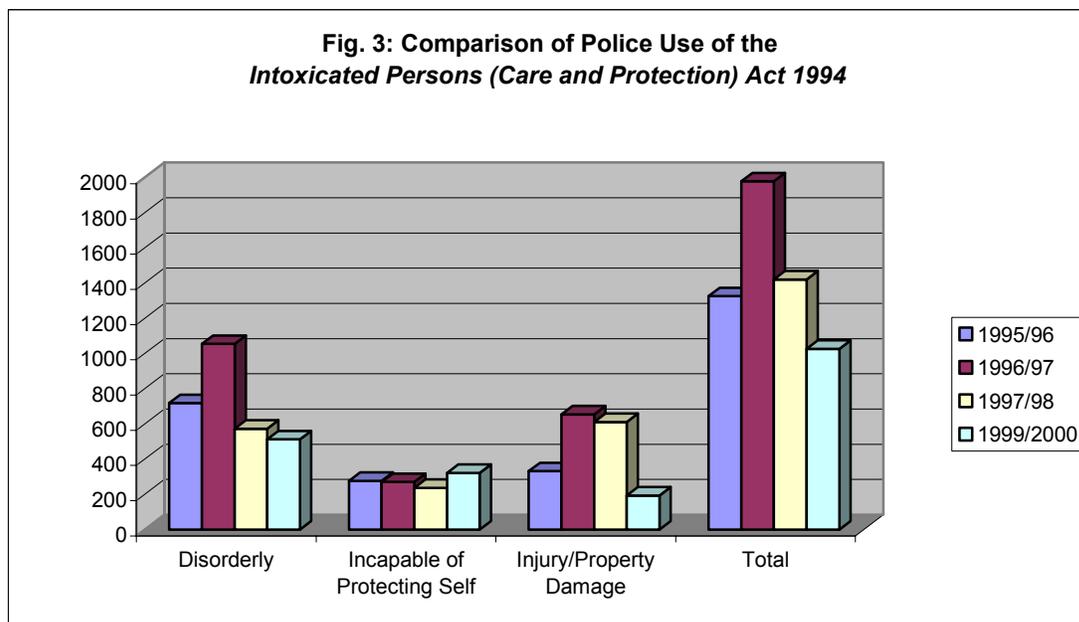
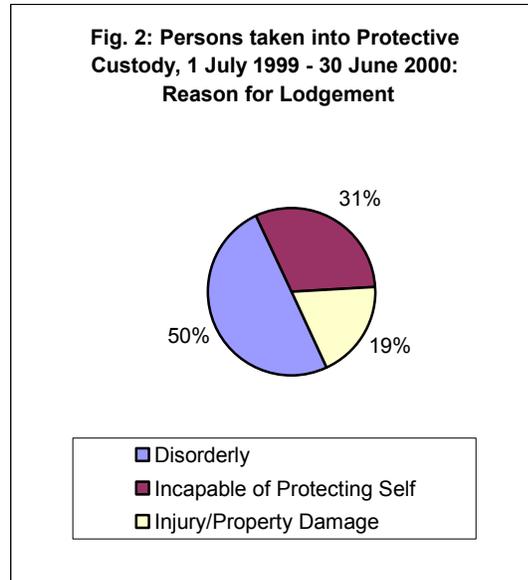
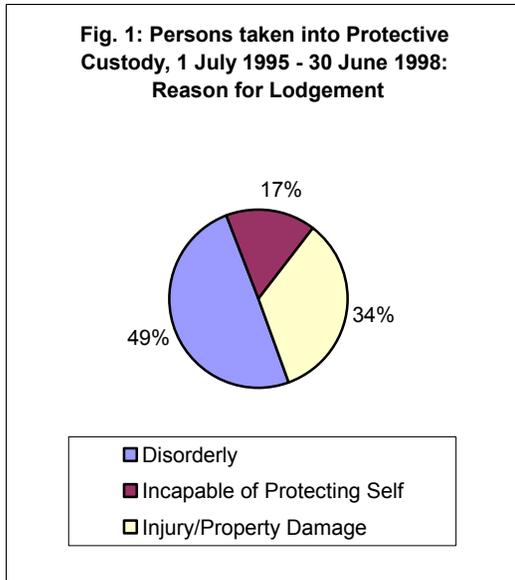
2.14 Most intoxicated persons are still being lodged in protective custody for disorderly behaviour. In 1999/2000, almost half of those in protective custody were lodged for disorderly behaviour, almost the same proportion as for the three-year period noted in the 1998 report (see Figures 1 and 2 below).⁶ However, the proportion of people being lodged for their own protection has increased from 17 per cent to 31 per cent (see Figures 1 and 2 below).⁷ Moreover, the absolute figure for those lodged for their own protection (321) is considerably greater than those similarly lodged for the period 1995/98 (averaging 261) (see Figure 3 below).

⁴ For 1995–1998 statistics, see the 1998 report, pp. 8–11.

⁵ See the 1998 report, pp. 11, 16. It should be noted that there is a very small overlap between persons taken into protective custody and persons later charged for street offences and/or the execution of warrants.

⁶ See the 1998 report, p. 10.

⁷ See the 1998 report, p. 10.



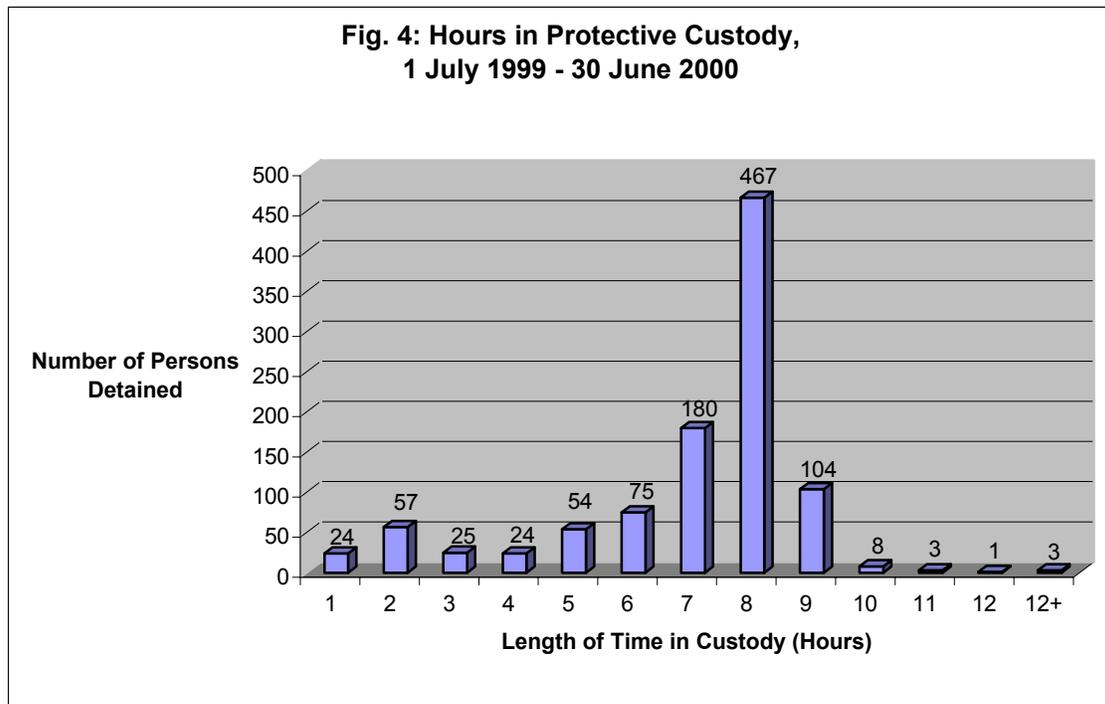
2.15 Men continue to make up the great bulk of detainees, with only twelve per cent being women (compared with eleven per cent for the 1995/98 period).⁸

2.16 My investigators also selected a sample of 198 cases, which they have examined in detail and which form some of the case studies in Part 3. The aim here was to assess how and perhaps why police were detaining people in protective custody, and particularly to assess how and why police were releasing

⁸ See the 1998 report, p. 11.

people. For this reason, the sample over-represents those cases of early release (before two hours – 64 cases) and late release (after eight hours – 32 cases).

2.16 The Ombudsman noted in his 1998 report that ‘there is a very low rate of early release of persons from the City Watch-house, with the majority of intoxicated persons being detained for around 7 hours’.⁹ This continues to be the case. Of the 1026 people detained in protective custody in 1999/2000, 586 (57%) were detained for more than seven hours, with only 78 (8%) being released in the first two hours of their detention (see Figure 4 below). It would also appear that police are detaining people for longer than the statutory eight-hour limit. In 1999/2000, 119 people (12% of the total in protective custody) were held for longer than eight hours (see Figure 4 below).¹⁰ This and other issues relating to time in custody are discussed in greater detail in Part 3 of this report.



⁹ The 1998 report, p. 23.

¹⁰ Note that one of those held for over ten hours and all of those held for over twelve hours were detained on warrants. However, that still leaves 115 people detained beyond the eight-hour statutory limit.

PART 3: IMPLEMENTATION OF 1998 RECOMMENDATIONS

3.01 The Ombudsman made eleven recommendations in his 1998 report, most of which related to the actions of police. I have set these out below, arranged under thematic headings, for discussion of what progress the AFP have made in implementing the recommendations, as well as for discussion of their effectiveness. I have also noted here any new issues arising under those thematic heads and have made recommendations accordingly.

Transportation of Detainees

1998 Recommendation 1: The AFP should review its approach to transporting intoxicated people to ensure their safety, and that the AFP's methods of transportation are consistent with the intent of the Act.

1998 Recommendation 2: In all cases where intoxicated persons do not respond to stimuli, or are lapsing in and out of consciousness, they should not be transported in a police vehicle but taken in an ambulance to hospital.

3.02 At the time of the 1998 report, the AFP supported these recommendations. AFP Guidelines on transportation of detainees now clearly state 'Extreme care is to be taken in transporting people in custody who are under the influence of liquor or drugs'.¹¹ Officers transporting intoxicated persons in 'caged vehicles' are reminded to 'be vigilant to ensure the safety of the individual'.¹²

3.03 AFP Guidelines further note that 'Any person taken into custody who is failing to respond to stimuli and/or [is] lapsing into and out of consciousness should be transported to hospital by ambulance'.¹³ A similar response is required for 'people in custody found to be seriously ill or unconscious'.¹⁴ The AFP Watch-house Guidelines repeat these directions.¹⁵

3.04 From my investigator's discussions with a number of AFP officers I am satisfied that ACT police are generally aware of the need for and importance of treating the transportation of intoxicated persons with extreme care. This is particularly so in relation to intoxicated persons who are or become seriously ill in custody, as can be illustrated by the following case study.

¹¹ 'Transporting of persons in custody', AFP ACT Policing, *Guidelines for Best Practice 4/96: Care of People in Police Custody*.

¹² *Ibid.*

¹³ 'People in custody who are injured or become ill', AFP ACT Policing, *Guidelines for Best Practice 4/96: Care of People in Police Custody*.

¹⁴ *Ibid.*

¹⁵ 'Persons unconscious or not easily roused' and 'Persons in custody injured or becoming ill', AFP ACT Policing, *Guideline for Best Practice 30/97: Watch House*.

Case Study 1

Patrol officers discovered a thirteen-year old boy on the street and asleep in a pool of his own vomit. The officers woke the boy, who was unable to stand or respond coherently to their questions. He appeared to be heavily intoxicated and was taken into protective custody on the grounds of being incapable of protecting himself. The officers carefully transported the boy to the City Watch-house, where he was taken directly to the cells, searched, laid out on a bed, and provided with a blanket. A short time later, Watch-house officers identified that the boy was having difficulty breathing. An ambulance crew was called and, upon arrival, determined that the boy should be transferred to Calvary hospital. Once at the hospital, the boy was diagnosed as having also taken drugs and was treated accordingly. The boy was at risk of death had he remained on the street.

3.05 Of the sixteen complaints reviewed by this office, only one concerned an allegation that police failed to exercise proper care in transporting the complainant to the Watch-house. The allegation was deemed incapable of determination, as it was impossible to establish when the injury (a broken knee) to the complainant occurred. However, it does emphasise the importance for police of determining what medical needs intoxicated persons might have before transporting them to the Watch-house, and calling for medical assistance if necessary. It also indicates the continued need to exercise care when transporting intoxicated persons.

New Issues Arising

Sedans and Caged Vehicles

3.06 Although the 1998 report did not expressly recommend the use of vehicles other than caged vehicles for transporting intoxicated persons to the Watch-House, the AFP clearly considered the Ombudsman's discussion of this issue and incorporated in their revised Guidelines the following statement: 'When possible, a non-aggressive individual who is responding to police directions should be transported in a sedan'.¹⁶

3.07 Despite this direction, the practice of using caged vehicles to transport intoxicated persons picked up by the City Patrol continues to be the norm, with a caged vehicle located close to Garema Place in the City specifically for use by the City Beat Patrol on their busy nights (Friday–Saturday).

Discussion

3.08 Although I commend the AFP for their consideration in relation to the direction on the use of sedans, I doubt that the Guidelines are sufficiently

¹⁶ 'Transporting of persons in custody', AFP ACT Policing, *Guidelines for Best Practice 4/96: Care of People in Police Custody*.

realistic. The direction that, when possible, officers should use sedan cars to transport compliant detainees to the Watch-House is not being consistently followed. To do so would mean that a caged vehicle should be used only when it is impossible, or at least difficult, to provide a sedan.

3.09 Failure of an officer to follow AFP Guidelines can give rise to disciplinary action. Guidelines requiring officers to use sedans for the transportation of compliant intoxicated persons in all situations unless impossible or difficult may at times impose too onerous a duty upon such officers.

3.10 Moreover, my investigator's discussions with officers indicate that in most cases it is more appropriate to use the caged vehicle: intoxicated persons may appear compliant when initially picked up, but are highly unpredictable and potentially dangerous. A sedan does not have adequate provision to protect both the detainee and the officers in the event of the detainee becoming agitated and/or hostile. A case study from the record of complaints to my office provides excellent evidence of this.

Case Study 2

Police received a call to attend a disturbance at the Canberra Hospital. Upon attending, the officers discovered an intoxicated woman shouting abuse at the nursing staff. The woman was taken into protective custody for disorderly behaviour and was placed in the rear of a sedan car. As the vehicle drove away from the hospital, the woman tried to get out of the car while it was moving. One of the officers had to reach back and drag her back into the car as it came to a stop, possibly causing bruising to the woman's arm. The woman had to be handcuffed for the remainder of the journey.

3.11 The caged vehicles are designed to minimise risk to the occupant, whether drunk or sober, and to provide safety to the officers in charge of the vehicle. However, in the 1998 report, the Ombudsman noted the use in other jurisdictions of seat belts in the caged confinement areas of police vans as an added element of safety, especially for those whose intoxication results in reduced motor skills.

Opinion

3.12 *In my opinion*, officers are well aware of their responsibility of care and protection towards intoxicated persons in protective custody and are properly following the Guidelines in relation to the use of ambulances to convey to hospital intoxicated persons who are or become seriously ill in custody.

3.13 *In my opinion*, the current Guidelines in relation to the use of sedan cars for intoxicated persons are too exacting. *In my opinion*, as caged vehicles are designed to minimise risk to the occupant, the use of caged vehicles for the

transportation of intoxicated persons is adequate. Therefore, *in my opinion*, it would be sufficient for revised AFP Guidelines to direct officers to use sedan cars *where appropriate*.

3.14 I have considered the use of seat belts in the rear of caged vehicles, but accept the AFP's advice that the risks to prisoners' safety outweighs their usefulness. However, *in my opinion*, this makes the continued need to exercise care when transporting intoxicated persons even more important.

Recommendations

- 1. The AFP should revise Guidelines to state that "Where appropriate, a non-aggressive individual who is responding to police directions should be transported in a sedan".**
- 2. The AFP should continue to ensure that officers exercise care when transporting intoxicated persons, especially in caged vehicles.**

Watch-House Practices

1998 Recommendation 3: Officers of the Watch-house should only place those intoxicated people who are violent or likely to injure themselves in holding cells. For other detainees, particularly in the situation where a Sobering-Up Shelter is not available, officers at the Watch-house should be required to be more proactive in pursuing the release of detainees into the care of a responsible person, as envisaged by the legislation.

1998 Recommendation 4: AFP procedures at the Watch-house should be streamlined to ensure that detainees are treated by Watch-house staff in a care and protection framework, as distinct from procedures relating to custody of offenders. Further, detainees should be processed quickly to facilitate appropriate release, or to confirm continued detention if necessary.

3.15 At the time of the 1998 report, the AFP gave partial support to recommendation 3 and full support to recommendation 4. For the purposes of this paper, I will break the discussion of these recommendations into three parts: the use of holding cells; the early release of appropriate detainees into the care of a responsible person; and the streamlining of Watch-house procedures. I then go on to discuss new issues arising in relation to the Watch-house.

Use of Holding Cells

3.16 In 1998, the Ombudsman recommended that only violent detainees and those likely to injure themselves should be housed in holding cells. This recommendation should be read in conjunction with recommendation 11 of the 1998 report, which suggested that part of the Watch-house be converted to a Sobering-Up Shelter. The reasoning behind recommendation 3 of the 1998 report

was that non-violent intoxicated persons who were not likely to injure themselves could be kept in that part of the Watch-house given over to the Sobering-Up Shelter pending their release to a responsible person or until sober.

3.17 Following recent discussions with the AFP, I am encouraged by the AFP's proposal that it should consult with the ACT Department of Health and Community Care with a view to determining the possibility of a collocated Sobering-Up Shelter within the Watch-house. However, in the absence of such a shelter, I accept the argument of the AFP that 'the safest available place for intoxicated persons in the Watch-house are the holding cells which meet all requirements as to safety and protection from harm and are fully monitored by video'.¹⁷

Early Release to Responsible Persons

3.18 At the time of the 1998 report, the AFP supported further research into 'the identification of alternative options for the early transfer of intoxicated persons into the care of a responsible adult, or alternative arrangements'.¹⁸

3.19 AFP Guidelines now clearly state that: 'If there is no other option available for the release of an intoxicated person, the person may be lodged in the Central Watch-house'.¹⁹ They also indicate that:

Within the eight-hour detention period, a member may consider the possibility of releasing the intoxicated person into the care of a responsible adult, if in the opinion of the member it is reasonable to do so. If the intoxicated person is fit to nominate a responsible person, and subject to their clear and unambiguous consent, a member may attempt to contact that nominated person and ascertain their suitability and willingness, to assume the responsibility for the care of the intoxicated person.²⁰

3.20 Although the Guidelines direct officers to the possibility of early release of an intoxicated person to a responsible adult, they do not specifically encourage it. The Guidelines direct Watch-house officers to consider detention as a last option, but allow discretion in relation to the option of early release to a responsible adult; that is, although officers should consider other options before detention, these do not have to include the option of early release to a responsible adult.

3.21 It is reasonable to assume that early release to a responsible adult is most likely to take place within the first two hours of detention. This would appear to be supported from an examination of my investigators' sample of 198 cases. Of

¹⁷ 'Ombudsman's Draft Report into the AFP Use of the Intoxicated Persons (Care & Protection) Act 1994', AFP Minute ACTR 983163, A.M. Whiddett to Ombudsman, 4 September 1998.

¹⁸ The 1998 report, p. 3.

¹⁹ 'Protective custody', AFP ACT Policing, *Guidelines for Best Practice 4/96: Care of People in Police Custody*.

²⁰ *Ibid.*

the 65 cases involving release within the first two hours of detention, 46 (71%) involved release to a responsible adult.²¹ Of the 54 cases involving release between two hours and six hours, only eleven (20%) involved release to a responsible adult. Of the 79 cases involving release after six hours, only six (8%) involved release to a responsible adult, and five of these were to the court with the remaining one to the Mental Health Crisis Team.

3.22 The statistics for 1999/2000 suggest that police may not be utilising the option of early release to a responsible adult as fully as they could. As I noted earlier (2.16), the majority of intoxicated persons taken into protective custody continue to be detained for seven hours or more, with less than ten per cent being released in the first two hours. The following case study from the record of complaints to my office is indicative of the passive approach of some officers to early release.

Case Study 3

Police attended a disturbance within a hospitality tent during Australia Day festivities 2000. There they found a woman who they believed to be heavily intoxicated and behaving in a disorderly manner. They offered her a number of opportunities to get a taxi and go home, but she refused. The woman became abusive towards the police and was taken into protective custody. After two hours and fifteen minutes she was released into the care of the ACT Ambulance Service who transported her to hospital for treatment of her hand, injured when she resisted police attempts to take her into custody. At no time did police attempt to contact her husband.

The AFP Internal Investigation report on her complaint noted 'There is no requirement for police to contact any person regarding another who has been lodged for being intoxicated. However, if an intoxicated person wishes a particular person to be notified, it is incumbent on them to inform the police of this'.

3.23 I accept that in some cases the detainee is unwilling or unable to provide a name for police to contact. Similarly, I understand that in some cases the responsible person contacted will be unwilling or unable to come and collect the detainee. However, from our discussions with Watch-house staff, I believe that in the majority of cases a responsible adult could be contacted and would take responsibility for the detainee if requested. It was for this reason that the Ombudsman recommended in 1998 that the Watch-house adopt a 'proactive' approach to early release.

²¹ This included twelve early releases into medical care.

3.24 A related issue has arisen in a number of the complaints reviewed by my office, namely the right of an intoxicated person to contact his or her legal representative or another responsible adult. In response to complaints that police have denied intoxicated persons access to legal representation, AFP Internal Investigation has responded: 'There is no requirement under [the Act] for police to allow the detained person access to legal representation'.²² However, the Watch-house Guidelines (30/97) state 'Upon request, reasonable facilities will be provided to enable persons to communicate with a legal practitioner and a relative or a friend'.²³

3.25 I accept the reasoning offered by one Watch-house sergeant, who said that in many cases it would not be appropriate to allow a heavily intoxicated person to make a telephone call, but that he would be happy to make a call on behalf of an intoxicated detainee if he or she can nominate a responsible recipient. This would include contact with a particular legal representative (if the detainee could nominate such a person), but would not include a right to legal representation *per se*. I believe this would be consistent with the Watch-house Guidelines cited above, but should be stated more explicitly in those Guidelines.

3.26 I have also noticed that, when releasing detainees into the care of a responsible adult, officers are not always entering sufficient details. The Guidelines clearly state that 'The record should include identification details of the responsible person'.²⁴ In the majority of cases from my investigators' sample, the Watch-house staff adequately identified the responsible adult, either by name, by reference to a clearly identifying relationship between the responsible person and the detainee (for example, parents), or both. However, in a small number of cases the responsible adult has been identified by an unclear reference to their relationship with the detainee (for example, "friend" or "relatives"). Such references would be inadequate if police later needed to determine to whom the detainee was released.

Streamlined Watch-house Procedures

3.27 In the 1998 report, the Ombudsman recommended that the Watch-house procedures be streamlined to ensure the processing of intoxicated persons in a care and protection framework rather than through the normal custody procedures. He also recommended that the processing of intoxicated persons

²² Federal Agent David Sharpe, II, to Senior Assistant Ombudsman, 23 March 2000 [AFP Ref: 990/20203; Ombudsman Ref: C/99/19824]. See also Federal Agent Dieter Tietz, II, to Senior Assistant Ombudsman, 9 May 2000 [AFP Ref: 990/20204; Ombudsman Ref: C/99/19821].

²³ 'Communication by persons in custody and disclosure of information', AFP ACT Policing, *Guideline for Best Practice 30/97: Watch House*.

²⁴ 'Protective custody', AFP ACT Policing, *Guidelines for Best Practice 4/96: Care of People in Police Custody*.

take place quickly, to facilitate early release or continued detention as appropriate. The AFP supported these recommendations.

3.28 The procedures for processing intoxicated persons continue to be much the same as the processing of those arrested for offences. The person is taken to a holding room, where he or she is searched and has loose items of property, shoelaces, belts and other such items of clothing removed. During this time, the arresting officers write up their Statement of Facts. The detainee is then taken to the custody counter, where the custody sergeant provides an inventory of the detainee's property, asks the detainee a series of questions to establish any particular risk, and reads out the charge. In the case of intoxicated persons, the custody sergeant indicates that the person is being lodged in custody for his or her own safety and protection and generally asks if there is anybody who could be contacted. The person is then taken to the holding cells. In those cases where the person is so intoxicated as to be unable to stand for the on-line charging, they are removed directly to the holding cells and charged *in absentia*.

3.29 Generally, the time spent in the holding rooms is between ten to fifteen minutes, dependant upon how busy it has been. Whilst in the holding rooms, detainees are clearly visible to the Watch-house staff, who are able to respond to any emergency if it arises. Similarly, all holding cells have short-circuit cameras which relay images to screens monitored by Watch-house staff. On-line charging also allows an officer other than the arresting officers to establish to his or her own satisfaction that the person is in fact intoxicated and in need of care and protection, and to further assess the person for early release or continued detention as appropriate.

3.30 Although the procedures for processing offenders and intoxicated persons are almost identical, I am satisfied that both exist within a strong care and protection framework. I am equally satisfied that the time taken for processing is appropriate. However, I understand that the AFP are assessing whether a streamlined process can be used for intoxicated persons.

New Issues Arising

Detention beyond Eight Hours

3.31 During the course of this investigation, it has become apparent to me that police are detaining a significant number of intoxicated persons beyond the eight-hour statutory limit. As I noted earlier (2.16), in 1999/2000, 119 people (12% of the total in protective custody) were recorded as being held for longer than eight hours. Police held some of these legitimately on charges.²⁵ However,

²⁵ One of those held for over ten hours and all three of those held for over twelve hours were detained on warrants.

this still leaves a substantial number of people recorded as detained for longer than the statutory period.

3.32 In many cases, the recorded late release time is due to poor recording of intoxicated person cases on the police database (PROMIS). Police have informed my investigators that, although an intoxicated person might be released just before the eight-hour limit, it might take a small period of time for the release to be recorded on the system. The statistics would appear to bear this out, with 77 (65%) of the 119 late releases being recorded as released within 15 minutes of the expiration of the eight-hour limit.²⁶

3.33 In a similar way, it has been noted that there are occasional errors when entering times, with officers logging the time of arrest in normal (am/pm) time rather than the system's 24-hour time. In 1999/2000, this led to at least five instances being recorded as twelve hours longer than they were.²⁷

Discussion

3.34 My understanding of the legislation is that police are required to release an intoxicated person from custody after eight hours in detention, but that the person may remain at the police station for an additional four hours, for instance if they are waiting to be collected by somebody. This accords with the Explanatory Memorandum for the Act, and with an opinion provided by AFP Legal.²⁸

3.35 Any person detained without just and legal cause has been falsely imprisoned. Similarly, any failure to release from confinement a person no longer legally entitled to be confined results in that person's false imprisonment.²⁹ Many of the people detained in protective custody for longer than eight hours have been asleep at the expiration of the eight hours. However, 'a person can be imprisoned while he is asleep, [or] while he is unconscious...'.³⁰ Therefore, any intoxicated person held by police for longer than eight hours has been falsely imprisoned, even if asleep.

3.36 Of course, a detainee can consciously elect to remain in the cell and sleep off their intoxication once the police have officially released them. Section 4(3) of the Act allows an intoxicated person to remain at a police station for up to twelve hours from the time of their arrest. My understanding is that Watch-house procedures would still require the cell to be locked, but this could be done with

²⁶ Of course, it is still possible that some of these 77 were released after more than eight hours detention.

²⁷ The figures used throughout this report are as amended by the information provided by the AFP.

²⁸ Federal Agent Errol Raiser, Coordinator, Operations Monitoring Centre, Professional Standards, AFP, to Senior Assistant Ombudsman, 26 September 2000 [AFP Ref: 989/20300; Ombudsman Ref: C/00/9062].

²⁹ See J.G. Fleming, *The Law of Torts*, (9th ed.), LBC Information Services, Sydney, 1998, pp. 33-36.

³⁰ *Meering v Grahame-White Aviation Co* (1919) 122 LT 44 at 53 per Atkin LJ.

the detainee's consent and on the proviso that the detainee would be immediately released upon his or her request.

3.37 Even if Watch-house officers believe that, after eight hours, a detainee is still intoxicated, they cannot detain the person without believing that another of the Act's criteria – disorderly behaviour, risk of harm to property or persons, or the intoxicated persons inability to protect themselves – is present. After eight hours without any alcohol or drugs, it might prove difficult to reasonably form such a belief. Moreover, the police can only act against people intoxicated in a public place. I do not believe that the Watch-house is a public place for the purposes of this Act. However, I believe Watch-house staff should remind intoxicated persons upon release of the possibility that their blood-alcohol levels might well be over the proscribed limit, and caution them against driving.

3.38 I understand that the ACT Department of Health and Community Care is considering putting together an "exit pack" for those released from protective custody. This would include literature explaining what protective custody is and setting out the detainee's rights when in protective custody. It is also envisaged that it might contain a phone card and either a bus ticket or cab voucher for the intoxicated person to use to return home. This would further reduce the need for any intoxicated person to remain at the station for any significant time after their release, as well as reducing the risk of a released person driving under the influence.

Opinion

3.39 *In my opinion*, and in the absence of a collocated Sobering-Up Shelter within the Watch-house, the police use of holding cells for housing intoxicated persons is both adequate and appropriate. Similarly, *in my opinion*, police use of on-line charging procedures for the processing of intoxicated persons is both adequate and appropriate. However, *in my opinion*, the AFP should continue to explore the proposal for health-care support for intoxicated persons held at the Watch-house, and should also explore using a more streamlined process for intoxicated persons within the care and protection framework.

3.40 *In my opinion*, Watch-house staff are still not making sufficient efforts to release intoxicated persons early into the care of a responsible adult. *In my opinion*, and in keeping with the Guideline's direction that detention should be a last option, *consideration* of early release to a responsible adult should be made mandatory. *In my opinion*, this could be done by the following simple amendment (marked in bold) to the Guidelines:

Within the eight-hour detention period, a member **shall** consider the possibility of releasing the intoxicated person into the care of a responsible adult, if in the opinion of the member it is reasonable to do so. If the intoxicated person is fit to

nominate a responsible person, and subject to their clear and unambiguous consent, a member **shall** attempt to contact that nominated person and ascertain their suitability and willingness, to assume the responsibility for the care of the intoxicated person.³¹

3.41 *In my opinion*, the AFP Guidelines should more clearly outline the rights of a person held in protective custody to communication with a legal representative and/or friends or relatives.

3.42 *In my opinion*, the AFP should ensure that officers accurately and consistently record lodgment and release times for intoxicated persons. *In my opinion*, the AFP should consider whether this could be done by using mandatory fields and reminder messages within the PROMIS database. Similarly, *in my opinion*, the Watch-house staff should ensure that all details of early release are recorded, including contact details of the nominated responsible adult and any attempts to make such contact. *In my opinion*, this should also include a statement of reasons in the case of a decision not to contact a responsible adult.

3.43 *In my opinion*, the Watch-house procedures have led in some instances to persons being detained beyond the statutory eight-hour limit without just cause. *In my opinion*, such actions appear to be contrary to law.

3.44 *In my opinion*, the Watch-house procedures should be reviewed to ensure that no intoxicated person is detained for longer than the statutory eight-hour limit. *In my opinion*, a more 'proactive' approach to the early release of intoxicated persons into the care of a responsible adult would substantially reduce the risk of people being detained for longer than eight hours. *In my opinion*, the Watch-house staff should also begin the release process earlier than is currently the case – perhaps giving consideration to release after seven or seven and a half hours – so as to prevent an person being detained for longer than eight hours. This would also mean that the Watch-house staff have sufficient time to ensure that the record of release accurately reflects the actual time of release.

Recommendations

- 3. The AFP should explore the possibility of providing health-care support for intoxicated persons held at the Watch-house.**
- 4. Officers of the Watch-house should be required to be more 'proactive' in pursuing release of detainees into the care of a responsible person. Towards this end, the AFP Guidelines 4/96**

³¹ 'Protective custody', AFP ACT Policing, *Guidelines for Best Practice 4/96: Care of People in Police Custody*. My alteration in bold.

should be amended to make mandatory the consideration of early release to a responsible adult if appropriate and if consent is obtained.

5. The AFP should review Guidelines to provide a clear statement of the rights of a person held in protective custody to communicate with a legal representative and/or friends or relatives.
6. The AFP should ensure that officers accurately and consistently record lodgement and release times for those in protective custody, possibly involving adjustments to the fields and messages in the AFP PROMIS system.
7. The AFP should review Watch-house recording procedures to ensure that sufficient information in relation to early release is recorded, including identification of the responsible adult, any attempts at contacting a responsible adult, and any reasons for not contacting a responsible adult.
8. The AFP should review Watch-house procedures to ensure that persons in protective custody are not detained for longer than eight hours.

Guidelines and Training

1998 Recommendation 5: The AFP should review its AFP Regional Guideline 4/96 to ensure that it fully reflects the care and protection role of officers in relation to intoxicated persons.

1998 Recommendation 6: The AFP should amend its AFP Regional Guideline 4/96 to provide clear guidance to officers on charges for street offences or the use of other powers, such as breach of the peace, in relation to intoxicated persons. The AFP should continue to provide training to its officers ensure their use of powers under the Act is consistent with the intent of the Act.

3.45 At the time of the 1998 report, the AFP supported both of these recommendations. Following the report, the AFP revised their Guidelines, to give a much greater emphasis on the care and protection role of officers in relation to intoxicated persons. At the same time, the AFP were implementing some of the recommendations of the Royal Commission into Aboriginal Deaths in Custody, which also stress the care and protection role of officers in relation to Aboriginals and Torres Strait Islanders in custody. As the Guidelines form the basis of training, it is reasonable to say that training now also better reflects the care and protection role.

3.46 Clarification of the Guidelines in relation to street offences has not been as successful. The revised Guidelines make only oblique, but contradictory, references to the use of charges for street offences as an alternative to protective

custody. The Guidelines direct that 'Prior to the decision to detain a person under the Act, members should consider other options to resolve the incident'.³² They also direct that 'Members are encouraged to view detention as a final option; however, it is recognized that in some circumstances there is no other reasonable option'.³³ The Watch-house Guidelines generally discuss the role of the Officer in Charge of the Watch-house in relation to charges, but do not address the issue of proposing street offence charges against an intoxicated person.³⁴

3.47 During our discussions, Watch-house sergeants indicated that they encourage officers to consider laying charges as an alternative to using protective custody, for example, requiring officers to provide a full Statement of Facts, which clearly set out the facts to support any possible offences. From an examination of my investigators' sample of 198 cases, I can see that this is so. However, Watch-house staff and other officers have also indicated the difficulty of obtaining sufficient evidence to establish a street offence in the eyes of the Director of Public Prosecutions and the Courts. This perhaps explains their reluctance to pass such charges on to the Director of Public Prosecutions.

3.48 The tension here is evident in the small numbers of street offence charges laid in the ACT. Between 1 July 1999 and 30 June 2000, 146 persons were apprehended for street offences.³⁵ This compares with over 500 persons detained for disorderly behaviour under the *Intoxicated Persons Act*.

Discussion

3.49 In his 1998 report, the Ombudsman discussed the apparent overlap between the summary (street) offence provisions of the *Crimes Act 1900* (ACT) and the protective custody provisions for intoxicated persons.³⁶ In the absence of any review and amendment of the legislation (see the discussion below at 3.59-3.61), the need for clear AFP Guidelines on this issue is paramount.

3.50 Although the revised AFP Guidelines make clear that officers should consider 'other options' before taking an intoxicated person into protective custody, the Guidelines do not make clear whether charges for street offences are included in those 'other options'. Moreover, the direction that officers should

³² 'Protective custody', AFP ACT Policing, *Guidelines for Best Practice 4/96: Care of People in Police Custody*.

³³ 'Protective custody', AFP ACT Policing, *Guidelines for Best Practice 4/96: Care of People in Police Custody*.

³⁴ See 'Charges', AFP ACT Policing, *Guideline for Best Practice 30/97: Watch House*.

³⁵ Figures supplied by ACT Policing, Prosecution and Judicial Support, 26 February 2001. Street offences have been defined as charges under sections 495, 545A, 546A, and 546B of the *Crimes Act 1900* (ACT).

³⁶ See the 1998 report, pp. 31-33.

‘view detention as a final option’ would seem to equally discourage the use of street offence charges and protective custody.

3.51 I understand that the law in regard to street offences has developed in a ‘piecemeal fashion’, is ‘fragmentary’ and confusing, and can therefore be difficult to maintain.³⁷ I also appreciate that there is a fundamental tension between the duty of the police to keep the peace and enforce the law and the increased emphasis on community policing, particular in relation to matters such as management of intoxicated persons. However, these issues make it even more important that the AFP provide clear guidance on what is expected of officers in relation to charges against intoxicated persons.

3.52 My understanding is that, if an officer reasonably believes that an offence has been committed and the officer can identify the offender, he or she has a duty to proceed. This remains true, whether or not the alleged offender is intoxicated.³⁸ How the officer proceeds is a matter for the officer’s discretion, although I believe that some action is required. For example, if the offender accepts the charges (when sober) and the offence is relatively minor (as many street offences are), it may well be appropriate for the officer to caution the offender. If there is evidence of violence or the apprehension of violence, it might be appropriate to charge the offender with a breach of the peace.

3.53 Protective custody is not an alternative to charging, even though it might still be appropriate to take an alleged offender into protective custody. The two following case studies reveal how the use of protective custody can disguise the existence of possible substantive offences.

Case Study 4

Police attended a bar in civic where a man was being held by a security guard. The man was moderately intoxicated and had been ejected from the bar after interfering with the DJ’s equipment. He became extremely aggressive and threw a number of punches at the security guard as he was escorted from the building. The man was taken into protective custody for behaving in a manner likely to cause injury to others. The man was not charged with any offences.

Case Study 5

Police attended a public road on report of a disturbance. There they found a stationary vehicle with one man behind the wheel and the other leaning on the bonnet. Police believed both men to be heavily intoxicated and both bore injuries that suggested they had been fighting. Both men became aggressive towards

³⁷ See ACT Community Law Reform Committee, *Street Offences*, Report 15, September 1997, p. 22.

³⁸ The removal of the so-called “drunk’s defence” by section XIB of the *Crimes Act 1900* (ACT) makes it clear that self-induced intoxication should not be a consideration for police when laying charges.

police and were taken into protective custody 'for drunk and disorderly'. Although one of the men was in charge of the vehicle at the time of being taken into custody – a possible drink-driving offence – the man was not charged with any offences.

3.54 Given the significant number of intoxicated persons detained in protective custody for disorderly behaviour, there is also a need to distinguish between disorderly behaviour for the purposes of protective custody and offensive behaviour for the purposes of charging. The latter is clearly a subset of the former, but, being a criminal offence, requires a much greater degree of seriousness,³⁹ so that it is possible to engage in disorderly behaviour that does not amount to offensive behaviour, but that all offensive behaviour is necessarily disorderly.

Opinion

3.55 *In my opinion*, the AFP's revised Guidelines now place sufficient emphasis on the police's role of care and protection in relation to intoxicated persons.

3.56 *In my opinion*, the AFP should amend its Guidelines to provide clear guidance to officers on charges for street offences or the use of other powers, such as breach of the peace, in relation to intoxicated persons.

3.57 *In my opinion*, if police have sufficient evidence to reasonably believe an offence has been committed, I believe they must take action against the alleged offender, although the form of that further action is at the officer's discretion. If an intoxicated person is to be charged with an offence, they can be detained until they are sufficiently sober to understand the charge and accept any possible bail conditions.

3.58 *In my opinion*, the AFP should also amend its Guidelines to provide clear guidance on the definition of "disorderly conduct" for the purposes of protective custody and "offensive behaviour" for the purposes of charging.

Recommendation

- 9. The AFP should amend its Guidelines to provide clear guidance to officers on charges for street offences or the use of other powers, such as breach of the peace, as an alternative to protective custody**

³⁹ In *Melser v Police* [1967] 67 NZLR 437, Turner J (at 444) defined the *offence* of disorderly conduct as 'conduct which, while sufficiently ill-mannered, or in bad taste, to meet with the disapproval of well-conducted and reasonable men and women, is also something more – it must, in my opinion, tend to annoy or insult such persons as are faced with it – and sufficiently deeply or seriously to warrant the interference of the criminal law'.

where appropriate. This should include a clear distinction between “disorderly conduct” for the purposes of protective custody and “offensive behaviour” for the purposes of charging.

Legislation

1998 Recommendation 7: The ACT Government should give consideration to a review of the Act and examine possible amendments to clarify the intended purpose and scope of the legislation in order to ameliorate problems associated with an apparent overlap between summary offences provisions and protective custody provisions for intoxicated persons. A principal aim of such amendments should be to provide clear guidance to the principal users of the legislation, the police.

1998 Recommendation 8: The ACT Government should consider amendments to the Act to ensure that the definition of ‘intoxication’ refers to a level of intoxication which seriously affects the functioning and behaviour of individuals. Further, the amended definition should be the accepted standard for AFP officers exercising their powers under the Act.

1998 Recommendation 9: The ACT Government should consider amendments to the Act to provide a mechanism for immediate review of detentions, and for authorisation by a superior officer of periods of detention greater than 4 hours, up to the maximum 8 hours allowable under the Act.

3.59 At the time of the 1998 report, the Chief Minister’s Department advised in response to these recommendations that there was ‘support for a re-examination of the Act in the context of developments in other jurisdictions and the issues raised in [the 1998] report’.⁴⁰ The AFP also supported review of the legislation, and indicated that, in response to 1998 recommendation 9, they had ‘initiated action to revise Regional Guidelines to require a documented review of any person detained in protective custody by the officer-in-charge of the City Watch-House at the 4 hour point’.⁴¹

3.60 As I noted earlier (1.06), my intention in this paper is to discuss issues relating to the AFP’s implementation of the recommendations of the 1998 report. As such, I will not address here the question of the ACT Government’s actions in response to the 1998 report, except in so far as they impact upon AFP practices and procedures. For ease of discussion, I will address these three

⁴⁰ The 1998 report, p. 34.

⁴¹ *Ibid.*, pp. 33–34.

recommendations under the headings of “Street Offences”, “Level of Intoxication” and “Review”.

Street Offences

3.61 There has been no legislative clarification of street offences in the time following the publication of the Ombudsman’s 1998 report. Nor has there been any such amendment to the *Intoxicated Persons (Care and Protection) Act 1994* (ACT). In the absence of such amendments, I have again recommended clarification of police Guidelines to provide the police with clear guidance on the use of street offences in relation to intoxicated persons (see the discussion above, 3.45–3.58).

Level of Intoxication

3.62 There has been no amendment to the *Intoxicated Persons (Care and Protection) Act 1994* (ACT) in relation to the level of intoxication necessary to warrant protective custody. However, changes in police procedures following the Ombudsman’s 1998 report and the reduced number of persons detained in protective custody suggest that the great majority of persons taken into protective custody are moderately to well affected by alcohol and/or drugs. My assessment of the Statements of Facts from my investigators’ sample of cases supports this view.

3.63 Given these developments, I have had an opportunity to reconsider the Ombudsman’s views on the current legislative provisions. What is important is not the level of intoxication, but rather the nexus between intoxication and one of the three criteria (disorderly behaviour, protection from harm, risk of injury or property damage). That is, police should be concerned less with how intoxicated a person is, and more with whether the person’s intoxication is such as to cause them to behave in a disorderly fashion, places them at risk, or places others at risk. Police are justified to place a person in protective custody if any one of these elements exists irrespective of the level of intoxication, provided they reasonably believe there is a causal link between the person’s intoxication and the existence of one of the three criteria. Clearly, the less intoxicated a person is, the harder it will be to reasonably establish the causal link.

3.64 The level of intoxication is relevant when assessing the release of an intoxicated person from protective custody. Section 4(2) of the Act requires that a person be released from custody as soon as that person is no longer intoxicated (or at the expiration of eight hours if that is sooner). However, the Guidelines are silent on the requirement of release when sober. From my review of the protective custody records and observation of Watch-house practices, it would appear that most Watch-house officers are releasing detainees when they sober

up, although the high number of detainees held for over seven hours is still a matter of some concern (see 3.18-3.44 above).

3.65 A related issue that has arisen from the complaints to my office concerns the possibility of using an objective measure for intoxication, with several people complaining that police did not give them an opportunity to scientifically prove that they were not intoxicated by use of breath analysis. In response to a recommendation of the Royal Commission into Aboriginal Deaths in Custody, the AFP instituted research into the comparative efficacy of subjective and objective tests for intoxication. The survey showed that:

subjective assessment of the level of intoxication of persons in custody and the results of breath testing for alcohol concentrations is highly positively correlated indicating that subjective assessment, by experienced staff, to determine levels of intoxication is a relatively accurate measure versus breath test results.⁴²

Although the use of breath testing would remove this cause of complaint, I am satisfied with the AFP's findings about the efficacy of subjective testing.⁴³

Review

3.66 There has been no amendment to the *Intoxicated Persons (Care and Protection) Act 1994* (ACT) in relation to review of protective custody or for authorisation of detention for longer than four hours. Similarly, and despite the AFP's stated intention to the contrary,⁴⁴ there has been no amendment of the AFP Guidelines to incorporate a documented review process. Nor has there been any change in circumstances that would suggest the need for and value of a review mechanism has diminished.

Opinion

3.67 *In my opinion*, officers should not take a person into protective custody unless they can reasonably be satisfied as to the causal link between the person's intoxication and the existence of one of the three legislative criteria (disorderly behaviour, protection from harm, risk of injury or property damage). *In my opinion*, AFP Guidelines should be revised to reflect this requirement.

3.68 *In my opinion*, the AFP should revise their Guidelines to remind officers of the legislative requirement to release a person from protective custody as soon as that person is no longer intoxicated.

⁴² Australian Federal Police, 'Statistical analysis of a survey data to provide information to evaluate breath analysis equipment in response to Recommendation No. 129 of the Royal Commission into Aboriginal Deaths in Custody, March to May 1996', n.d. [c.1996], p. vii.

⁴³ In any case, breath testing cannot determine whether a person is under the influence of drugs.

⁴⁴ See the 1998 report, pp. 33–34.

3.69 *In my opinion*, there is still a need to have some review mechanism for holding an intoxicated person in protective custody beyond four hours. *In my opinion*, the AFP's proposed response in 1998 – 'a documented review of any person detained in protective custody by the officer-in-charge of the City Watch-House at the 4 hour point' – would satisfactorily meet the need for such a review mechanism.

Recommendations

10. The AFP should ensure that Guidelines make clear the need for officers to be reasonably satisfied as to the causal link between a person's intoxication and the existence of one of the three legislative criteria (disorderly behaviour, protection from harm, risk of injury or property damage) before taking that person into protective custody.
11. The AFP should revise Guidelines to include a documented review by the officer-in-charge of the City Watch-House of any case of an intoxicated person detained in protective custody at the four-hour point.

Sobering-Up Shelter

1998 Recommendation 10: As envisaged by the legislation, the ACT Government should ensure the provision of a Sobering-Up Shelter. Any new sobering up facility would be most useful if established in the Civic area and may need to have the capacity to accommodate up to 15 male and 5 female admissions at any one time.

1998 Recommendation 11: The ACT Government, in consultation with the AFP, may wish to give consideration to the practical benefits of locating such a sobering up facility in the City Watch-house. Additionally, any such facility should utilise health care professional staff, to ensure that intoxicated people receive appropriate care.

3.70 At the time of the 1998 report, the Department of Health and Community Care advised that 'the establishment of a Sobering-Up Shelter is endorsed Government policy'.⁴⁵ It was also noted, particularly in relation to the proposed collocation of the Sobering-Up Shelter in the Watch-house, that:

the AFP has by necessity assumed the role of providing care and protection of intoxicated persons by detaining intoxicated persons in protective custody in the City Watch-House ... Pending resolution of the establishment of a permanent Sobering Up Shelter, the AFP supports further research in consultation with the relevant ACT Government agencies and the Ombudsman's Office into the

⁴⁵ The 1998 report, p. 37.

identification of alternative options for the early transfer of intoxicated persons into the care of a responsible adult, or alternative arrangements.⁴⁶

3.71 In January 1999, as part of the efforts to consider collocation of sobering up facilities at the City Watch-house, two officers of the Department of Health and Community Care undertook “action research” to determine the suitability of employing health care workers for intoxicated persons in protective custody. They concluded that ‘it would be impractical to try to separate “police” from “welfare” functions in the one premises’, and that Watch-house staff were already providing a satisfactory level of care. Accordingly, they recommended against the employment of health care workers at the City Watch-house.

3.72 In November 1999, the Department of Health and Community Care wrote to my office and indicated that, as ‘suitable arrangements for intoxicated persons have been made at the Watchhouse, it is proposed not to proceed with the establishment of a sobering up facility at this time’.⁴⁷ The Department also informed my office of the establishment of an expert sub-group of the inter-agency Committee on Alcohol and other Drugs to monitor and oversight procedures at the Watch-house, and undertake further research on the most appropriate approach for the ACT.

3.73 An ACT interdepartmental discussion paper of August 2000 costed a stand alone 20-bed sobering up facility, as recommended in the Ombudsman’s 1998 report, at approximately \$500,000 recurrent, plus establishment costs.⁴⁸ The proposed option was to proceed by funding the introduction of sobering up beds into existing services. In October 2000, the Government announced \$50,000 for the purchase of one or two such beds, but failed to receive any response from existing shelters and services. The Government is now reconsidering what options are available to it in relation to the provision of sobering-up beds.

3.74 It is clear that, for the foreseeable future, the Watch-house will continue to accommodate the great majority of intoxicated persons. I am confident that, taking into account the relevant recommendations of this paper, the Watch-house can satisfactorily provide for the care and protection of intoxicated persons in protective custody. I also note and support the AFP’s proposal to discuss this issue with the ACT Government.

⁴⁶ *Ibid.*

⁴⁷ Dr Penny Gregory, Executive Director, Department of Health and Community Care, to Peter Hassell, Senior Investigation Officer, Commonwealth Ombudsman’s Office, 24 November 1999 [OS/97/12, Pt 2].

⁴⁸ Interagency Committee on Alcohol and Other Drugs (ICAD) Discussion Paper, ‘Sobering Up Facility’, n.d. [2000], p. 1.

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Commonwealth Ombudsman

APPENDIX I. OTHER RELEVANT LEGISLATION

Liquor Licensing Laws

The sale and public consumption of alcohol and the licensing of premises in the ACT are regulated under the *Liquor Act 1975* (ACT). Police are empowered to act in response to certain offences under the *Liquor Act*, including consumption or possession of alcohol in prescribed public places and under-age drinking. Police are also empowered to act against licensees who 'sell or supply liquor to a person where there are reasonable grounds for believing that the person is intoxicated'.⁴⁹

The licensing laws also establish licensing hours, which currently require licensees to cease trading at 5:00am. This has an impact on the strategies police have had to adopt to manage intoxicated person, particularly in the Civic and Manuka areas, which house the majority of licensed venues frequented by young people.

Street Offences

Police have the power to arrest and charge in relation to a number of street offences – essentially offences against public order. These include breaches of the peace, fighting in public, offensive behaviour and language, and indecent exposure.⁵⁰ Street offences cover a range of disorderly behaviour, attracting minor penalties and allowing the Courts the option of not recording convictions against first offenders.

The "drunk's defence" has been removed by section 428XC of the *Crimes Act 1900* (ACT). This means that a defendant can no longer claim that self-induced intoxication prevented the defendant from forming the necessary *mens rea* for committing an offence.

In my 1998 report, I suggested that the possibility of an intoxicated person's release on bail was a consideration of police when considering the use of protective custody above charging. Normally, when a person is arrested for a minor offence he or she will be bailed immediately on providing an undertaking to appear.⁵¹ However, the *Bail Act 1992* (ACT) makes clear that persons under the influence of alcohol or drugs who have been charged with a minor offence are not to receive these special bail conditions.⁵² Moreover, custody sergeants are well aware that a person cannot accept bail when intoxicated, as they are not fit

⁴⁹ Section 138(1) of the *Liquor Act 1975* (ACT).

⁵⁰ See generally Part XIV of the *Crimes Act 1900* (ACT).

⁵¹ Section 7(2) of the *Bail Act 1992* (ACT).

⁵² Section 7(3) of the *Bail Act 1992* (ACT).

to accept the charges. Instead, the intoxicated offender will be held in protective custody and bailed when sober.

Drink Driving Offences

The *Road Transport (Alcohol and Drugs) Act 1977* (ACT) creates the offence of driving under the influence of drugs or alcohol and driving with a blood-alcohol concentration equal to or above the prescribed limit. Driving includes being in charge of a vehicle, whether moving or stationary. The *Road Transport (Alcohol and Drugs) Act 1977* (ACT) also empowers police officers to require a suspect to take a screening test and to take such person into custody for the purpose of a breath analysis test, blood test or other medical examination.

Treatment of Inebriates

Under the *Inebriates Act 1900* (NSW), a court can declare an habitual abuser of alcohol or drugs an inebriate, imposing upon them a period of custodial or non-custodial treatment. This involves the person entering into a recognisance whereby he or she agrees to abstain from the consumption of intoxicating substances for a period of no less than 12 months.

Custodial treatment for inebriates is generally provided through Kenmore Hospital in Goulburn.

The Act has not been repealed by subsequent legislation and continues to provide an option for the Courts in diverting people with alcohol and drug addictions for treatment.